84-770

No.

Office - Supreme Court, U.S.
FILED
NOV 9 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SAVE MART OF MODESTO, INC.,
Petitioner,

VS.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 126,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

McLAUGHLIN AND IRVIN
PATRICK W. JORDAN
HENRY F. TELFEIAN
COUNSEL OF RECORD
333 Market Street, #1050
San Francisco, CA 94105
Telephone: (415) 777-0115
Counsel for Petitioner
Save Mart of Modesto, Inc.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

80PP

QUESTIONS PRESENTED

1. Does a federal court have jurisdiction to decide an issue of representation within the exclusive purview of the National Labor Relations Board?

2. Does federal law turn on the forum in which a claim is asserted such that arbitration may be compelled though in the absence of an arbitration provision the court would lack subject matter jurisdiction to entertain the dispute?[1]

---

[1]There are no interested parties other than those designated in the caption. Petitioner is a privately held corporation.

TABLE OF CONTENTS

	Page
Questions presented	i
Citation to opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement of the case	2
Reasons for granting the writ	3
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases

Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc., 693 F.2d 81 (9th Cir. 1982); cert. den. 53 L.W. 3263 (1984) 3

Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc., ... U.S. ....., 53 L.W. 3263 (1984) 3

Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964) 5, 6, 7

Carpenters Local Union No. 1478 v. Stevens, ... F.2d ....., 117 LRRM 2023 (1984) 3, 5

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (1982) 4

Computer Sciences Corp. v. NLRB, 677 F.2d 804 (1982) 4

Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974) 3, 4, 8

Local 3-193 Int'l. Woodworkers of America v. Ketchikan Pulp Co., 611 F.2d 1295 (9th Cir. 1980) 4

Local Union 204, Int'l. Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co., 668 F.2d 413 (8th Cir. 1982) 3, 5

Table of Authorities Cited

Cases

Page

Marion Power Shovel Co., Inc., 230 NLRB 576 (1977).... 6

South Prairie Construction Co. v. Local No. 627, Int'l. Union of Operating Engineers, 425 U.S. 800 (1976) 5, 6, 7

Teamsters Local 807 v. Brink's, Inc., ... F.2d ....., 117 LRRM 2306 (2nd Cir. 1984) 3, 5, 8

Statutes

Labor-Management Relations Act:

Section 157 ..... 1, 7

Section 159 ..... 1, 5

Section 301 .....1, 2, 4, 6, 7, 8

28 U.S.C. Section 1254(1) 1

Other Authorities

Anderson, Suits to Bind Non-Signatories to Collective Bargaining Agreements Under Section 301: The Emerging Federal Common Law, 1983 B.Y.U.L.Rev. 241 7

Comment, Arbitration of Representational Issue: A Critique of Carey, 1983 B.Y.U.L.Rev. 349 .....5, 6, 7

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SAVE MART OF MODESTO, INC.,
Petitioner,

VS.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 126,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Save Mart of Modesto, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on September 11, 1984.

CITATION TO OPINION BELOW

The decision of the Court of Appeals is printed in the Appendix hereto and is not officially reported.

JURISDICTION

The Decision of the Court of Appeals for the Ninth Circuit was issued on September 11, 1984. No Petition for Rehearing having been filed, this Petition For Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant parts of Sections 157, 159 and 301 of the Labor-Management Relations Act of 1947, as amended,

(hereinafter "LMRA") are set forth in the Appendix hereto. No constitutional provisions are implicated.

STATEMENT OF THE CASE

Save Mart of Modesto, Inc. (hereinafter "Save Mart") operates a chain of retail supermarkets in the State of California. Until 1983, employees working in the meat departments of stores located in various California counties were represented for the purposes of collective bargaining by United Food and Commercial Workers Union Local 126 (hereinafter "Union").

In February, 1983, Save Mart opened a new retail store in Hanford, California. Two weeks before the store opened to the public, the Union demanded that Save Mart apply the existing collective bargaining agreement to the Hanford meat department employees. The Union did not claim to represent a majority of the employees working in the meat department nor did it claim that it had any objective evidence that the employees wished union representation.

Save Mart rejected the Union's demand. The Union then filed a grievance asserting that the company had violated the contract "by failing to apply the collective bargaining agreement to the employees in the Hanford store." When Save Mart refused to submit this grievance to arbitration (though it did agree to arbitrate other grievances), the Union filed a Petition to Compel Arbitration with the United States District Court for the Eastern District of California which subsequently ordered arbitration. The District Court's jurisdiction had been invoked under Section 301 of the LMRA.

REASONS FOR GRANTING THE WRIT

The extent to which the federal jurisdiction exists under Section 301 over representation questions within the purview of the National Labor Relations Board ("NLRB") has been subject to much dispute and conflicting Circuit Court interpretation. *See generally Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, ... U.S. ....., 53 L.W. 3263 (1984) (Justices White and O'Connor dissenting from denial of certiorari).[2] In compelling arbitration, the Ninth Circuit not only resurrects this inter-Circuit dispute but adds an additional twist by allowing federal law to vary depending on the forum in which the representational claim is asserted, in direct contravention of this Court's decision in *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). By doing so, the Ninth Circuit creates a new inter-Circuit dispute. *See Teamsters Local 807 v. Brink's, Inc.*, ... F.2d ....., 117 LRRM 2306 (2nd Cir. 1984).

Three Courts of Appeals have held that they lack jurisdiction under Section 301 to consider representational issues. *Local Union 204, Int'l. Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co.*, 668 F.2d 413 (8th Cir. 1982); *Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982); *cert. den.* 53 L.W. 3263 (1984); and *Teamsters Local 807 v. Brink's, Inc., supra.* In another context, the Eleventh Circuit Court of Appeals has declined to exercise juris-

---

[2]As predicted by Justice White, the conflict continues to widen. As discussed *infra*, the Second Circuit Court of Appeals has added its voice to the dispute, *Teamsters Local No. 807 v. Brinks, Inc.*, ... F.2d ...., 117 LRRM 2306 (1984), while the Ninth Circuit continues to adhere to its announced position. *Carpenters Local Union No. 1478 v. Stevens*, ... F.2d ...., 117 LRRM 2023 (1984).

diction to avoid interfering "with the congressional distribution of authority between executive agencies and the judicial branch." *Computer Sciences Corp. v. NLRB,* 677 F.2d 804 (1982). In contrast, the Fifth Circuit Court of Appeals has held that Section 301 jurisdiction does exist over representational issues. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d 489 (1982).

Consistent with its position, the Ninth Circuit has also held that, in the absence of an arbitration provision, it lacks jurisdiction to determine whether an existing collective bargaining agreement covers a new location. *Local 3-193 Int'l. Woodworkers of America v. Ketchikan Pulp Co.,* 611 F.2d 1295 (9th Cir. 1980). Nonetheless, the Court requires Save Mart to arbitrate whether its existing collective bargaining agreement should be applied to a new store. The Union is permitted to press its arbitral claim though the *identical* claim could not be pursued in court. Such a result is clearly contrary to this Court's holding in *Howard Johnson Co. v. Detroit Local Joint Executive Board, supra,* wherein the Court *refused to compel arbitration* since the remedy sought, application of the collective bargaining agreement to a successor employer, was contrary to developed labor law. The Court was unwilling to permit federal labor law to turn on the forum in which a particular claim was pressed.

Though the Ninth Circuit has puzzled over the dilemma of why an arbitrator should possess the derivative power under Section 301 to resolve a dispute beyond the subject matter jurisdiction of the court, it fails to provide a solution. *Local No. 3-193, Int'l. Woodworkers v. Ketchikan Pulp Co., supra,* at 1298-1299. Indeed, this anomaly recently

led the court to conclude that "[a] persuasive argument can be made that it is even less appropriate for arbitrators than for courts to decide representational issues within the Board's primary jurisdiction. See Comment, *Arbitration of Representational Issues: A Critique of Carey*, 1983 B.Y.U.L. Rev. 349." *Carpenters Local 1478 v. Stevens*, ... F.2d ....., 117 LRRM 2023, n. 11 (9th Cir. 1984).

In contrast, under analogous facts, the Second Circuit refused to compel arbitration concluding that the representational obligation sought to be imposed has its origins in Section 159 of the LMRA and cannot be said to be contractual in nature. *Teamsters Local 807 v. Brink's, Inc., supra.* Unlike the Ninth Circuit, the Second Circuit rejected the union's efforts to characterize the dispute as contractual merely because reference could be made to a collective bargaining agreement. *See also Local Union 204, Int'l. Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co., supra,* at 420. ("To allow such a result [review of a representational matter] would render nugatory sections 8, 9, and 10 of the Act, 'for every dispute concerning the appropriate bargaining unit could be recast in terms of a breach of an "alleged" bargaining agreement.'")

The confusion exhibited by the Ninth Circuit and the conflict that presently exists between the various Courts of Appeals is a direct result of the basic inconsistency between *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), and *South Prairie Construction Co. v. Local No. 627, Int'l. Union of Operating Engineers,* 425 U.S. 800 (1976) (*per curiam*). *See generally* Comment, *Arbitration of Representational Issues: A Critique of Carey, supra,* at pp. 354-356. Attempts to reconcile these two cases has led to greater confusion.

In *Carey,* the Court held that a question concerning representation, though subject to resolution by the NLRB, could be arbitrated. Since an arbitrator possesses no magical power but is merely an agreed-upon dispute resolution mechanism whose authority is derived from Section 301, the lower courts concluded that they, too, possess this authority. But, this Court undercut *Carey* when twelve years later it ruled in *South Prairie* that the appropriateness of a bargaining unit was a representational question reserved in the first instance to the NLRB. Since Congress had given the NLRB the authority to make the initial determination, the judiciary was precluded from invading the NLRB's province. This Court's failure to reference *Carey* in *South Prairie* led to the subsequent inter-Circuit disputes on (1) whether the courts retain any jurisdiction to consider representational issues and (2) whether these issues can properly be referred to arbitration.

Representational issues, in the context of a Section 301 action, inherently involve a determination of whether particular employees are covered by an existing collective bargaining agreement. Congress gave the power to determine such representational issues to the NLRB because the determination turns on *statutory* criteria within the expertise of the NLRB. *South Prairie Construction Co. v. Operating Engineers, supra,* at 803-804. The parties' contractual agreement, whether express or not, is of no relevance. "The determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria." *Marion Power Shovel Co., Inc.,* 230 NLRB 576, 577-578 (1977).

Direct actions under Section 301 for breach of contract or to compel arbitration are nothing more than efforts to circumvent the NLRB's exclusive authority to make a statutory determination. An arbitrator, or a court acting in the shoes of an arbitrator, is enforcing contractual rights and is not concerned with the statutory criteria developed and applied by the NLRB. One of the principal, if not the principal, cornerstones of national labor law is the protection embodied in Section 157 of the LMRA guaranteeing to employees the exercise of full freedom of association and the right to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. In *South Prairie* this Court recognized that this protection could only be maintained if the NLRB's authority was not infringed.

Simply stated, *Carey* conflicts with the reasoning enunciated in *South Prairie* and has led to the confusion and conflicting decisions that presently exist among the Circuit Courts of Appeal. *See* Comment, *Arbitration of Representational Issues: A Critique of Carey, supra*; and Anderson, *Suits to Bind Non-Signatories To Collective Bargaining Agreements Under Section 301: The Emerging Federal Common Law*, 1983 B.Y.U.L.Rev. 241. Efforts by the lower courts to reconcile *Carey* and *South Prairie* have proven unsuccessful. Indeed, the tension has led to the strange result exhibited in the instant case wherein the Ninth Circuit compels arbitration on an issue which it acknowledges it lacks subject matter jurisdiction to entertain. The Court permits the Union to pursue its arbitral claim though the identical judicial claim would be barred. The direct consequence is to allow federal law to vary depending on the forum in which the claim is asserted—a variance that this

Court severely condemned in *Howard Johnson Co. v. Detroit Local Joint Executive Board, supra.* At least the Second Circuit avoids this intra-Circuit inconsistency by refusing to order arbitration. *Teamsters Local 807 v. Brink's, supra.*

The conflicting Circuit decisions and the intra-Circuit variance in the Ninth Circuit will not be resolved until this Court determines the jurisdictional scope of Section 301. Until then, the present conflict will widen, and federal law will turn on the forum in which a claim happens to be litigated.

CONCLUSION

There is wide disagreement on the question of whether Section 301 empowers the judiciary to consider questions of representation. Only this Court can resolve the divergent views expressed by the various Courts of Appeal. For the foregoing reasons, this Petition For Writ of Certiorari should be granted.

DATED: November 8, 1984.

Respectfully submitted,

McLaughlin and Irvin
Patrick W. Jordan
Henry F. Telfeian

By Henry F. Telfeian
Attorneys for Petitioner
Save Mart of Modesto, Inc.

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 83-2319

D.C. No. CIV F-83-127-EDP
United Food and Commercial Workers Union,
Local No. 126,
Plaintiff/Appellee,

vs.

Save Mart of Modesto, Inc.,
Defendant/Appellant.
[Filed Sept. 11, 1984]
Appeal from the United States District Court
for the Eastern District of California
Edward Dean Price, District Judge, Presiding
MEMORANDUM*

Argued and Submitted May 16, 1984

Before: ANDERSON, SKOPIL and POOLE,
Circuit Judges.

Save Mart appeals the district court's order compelling arbitration. We affirm.

At issue is the parties' collective bargaining agreement requiring Save Mart to recognize the union as the exclusive bargaining agent for "all employees covered by this Agreement" within the union's jurisdiction. Despite its prior practice, Save Mart refused to extend the union contract

---

*Per Ninth Circuit Rule 21, this disposition is not intended for publication and shall not be cited as precedent.

to a new store until the union demonstrated majority status. The union immediately filed a grievance, and when Save Mart resisted arbitration, the union sought to compel arbitration.

When faced with a petition to compel arbitration, a court must decide if the contract provides for arbitration of the particular dispute. *Alpha Beta Co. v. Retail Store Employees Union, Local 428,* 671 F.2d 1247, 1250 (9th Cir. 1982). The relevant provision here calls for arbitration of "[a]ny dispute that may arise as to the interpretation of this Agreement." There is a strong presumption in favor of arbitrability. *United Food and Commercial Workers Unions v. Alpha Beta Co.,* 736 F.2d 1371, 1374 (9th Cir. 1984). "An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960) (footnote omitted). In light of the strong presumption, we have no problem in agreeing with the district court that the dispute falls within the coverage of the parties' arbitration clause.

Save Mart correctly argues, however, that a court cannot compel arbitration if the contract clause on its face violates federal law or is contrary to federal labor policy. *United Food,* 736 F.2d at 1376. Save Mart contends that the union is attempting to arbitrate an accretion clause and thereby force union representation on the new store employees in violation of their self-determination rights under section 7 of the NLRA. *See generally Local No. 3-193 International Woodworkers of America v. Ketchikan Pulp Co.,* 611 F.2d 1295, 1301 (9th Cir. 1980).

We cannot say, however, that the clause is unlawful on its face. *See Haig Berberian, Inc. v. Cannery Warehousemen,* 535 F.2d 496, 499 (9th Cir. 1976). The arbitrator may determine that the clause is not illegal because it was intended either to be a waiver of Save Mart's right to demand an election, or because extending coverage of the contract will not violate the employee's section 7 rights. Moreover, a conflict between the arbitrator's decision and federal labor law "is necessarily speculative when the arbitrator has yet to rule." *United Food,* 736 F.2d at 1376 (quoting *Hospital & Institutional Workers Union Local 250 v. Marshal Hale Memorial Hospital,* 647 F.2d 38, 42 (9th Cir. 1981)). Any conflict can be later resolved in an action to enforce the award. The mere possibility of conflict cannot defeat arbitration. *United Food,* 736 F.2d at 1376.

Finally, we note that even if the dispute implicates representational rights of the employees, arbitration may not be foreclosed. *See Carey v. Westinghouse Electric Corp.,* 375 U.S. 261, 272 (1964); *United Food,* 736 F.2d at 1379, n.13. Resort to arbitration "may as a practical matter end the controversy or put into movement forces that will resolve it." *Carey,* 375 U.S. at 265. If ultimately the Board disagrees, its ruling would take precedence, *Carey, id.* at 272, and the court would refuse to enforce the award. *See e.g., Cannery Warehousemen, Food Processors, Drivers & Helpers for Teamsters Local Union #748 v. Haig Berberian, Inc.,* 623 F.2d 77, 82 (9th Cir. 1980).

This appeal is not frivolous. We decline to award sanctions. AFFIRMED.

APPENDIX B

In the United States District Court for the
Eastern District of California
United Food and Commercial Workers Union,
Local No. 126,
Petitioner.
v.
Save Mart of Modesto,
Respondent.
CV F 83-127-EDP

ORDER

[Filed Aug. 10, 1983]

This matter came on regularly for hearing before the Court on July 26, 1983, with the Honorable Edward Dean Price, United States District Judge presiding, Henry F. Telfeian of McLaughlin and Irvin appearing for Respondent Save Mart of Modesto, Inc., and Paul D. Supton of Van Bourg, Allen, Weinberg & Roger appearing for the Petitioner United Food and Commercial Workers Union, Local No. 126. The Court having heard the argument of counsel, considered the evidence presented, and due deliberation have been had,

IT IS HEREBY ORDERED that Save Mart of Modesto, Inc. submit and process all disputes concerning the Hanford store through the grievance and arbitration provision contained in the parties' collective bargaining agreement, up to and including arbitration of said dispute.

DATED: August 9, 1983.

EDWARD DEAN PRICE
Edward Dean Price
United States District Judge

Appendix C

United States Code, Title 29, Section 157

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

United States Code, Title 29, Section 159 (a), (b)

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . .

United States Code, Title 29, Section 301(a)

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees

in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.